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IN THE

# Supreme Court of the United States

OCTOBER TERM 1966

No. 1135

HARRY H. LEVY,

*Petitioner,*

—against—

GLICKMAN CORPORATION, LOUIS GLICKMAN, LOUIS A. SIEGEL, AARON KATZ, WILLIAM M. JENNINGS, WILLIAM G. DILLON, BACHE & CO., HIRSCH & CO., INCORPORATED, HIRSCH & CO. and MORRIS COHON & COMPANY,

and

MURRAY J. FOX, DOROTHEA FOX, SOL FOX and SYLVIA FROST, on behalf of themselves, and as representatives of all other persons similarly situated,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# Supreme Court of the United States

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HARRY H. LEVY,

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*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To The Honorable The Chief Justice and The Associate Justices of The Supreme Court of The United States:*

The Petitioner HARRY H. LEVY prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

## Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 355 F.2d 161 and is printed in the Appendix, p. A1. The opinion of the District Court is not reported and is printed in the Appendix, p. A11.

## Grounds of the Jurisdiction of this Court

The judgment of the Court of Appeals for the Second Circuit is dated December 20, 1965 and was entered the same day. It affirms an order of the United States District Court for the Southern District of New York which denied the application of the petitioner to intervene as a party plaintiff in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure. The order of the District Court was entered on June 28, 1965. The jurisdiction of the District Court in this action is premised upon Section 22(a) of the Securities Act of 1933 (15 U.S.C. Sec. 77v(a)), and Section 27 of the Securities and Exchange Act of 1934 (15 U.S.C. Sec. 78aa). The amended complaint alleges violations of various sections of the said Acts by the respondents-defendants in connection with the sale to the public of shares of the respondent Glickman Corporation pursuant to a prospectus and registration statement filed by said respondent with the Securities and Exchange Commission.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## The Questions Presented for Review

1. Was the petitioner entitled to intervene in this action as of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure?

2. In considering the petitioner's application as one for permissive intervention under Rule 24(b)(2), Federal Rules of Civil Procedure were the Courts below authorized to consider that the petitioner would be entitled to be heard in objection to a proposed compromise of the action under Rule 23(c) of the Federal Rules of Civil Procedure?

## Statutes Which the Case Involves

FEDERAL RULES OF CIVIL PROCEDURE

Rule 24. *Intervention.*

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties as

provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. * * *

Rule 23. *Class Actions.*

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

* * *

(c) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

## Statement of the Case

The petitioner made application to intervene as plaintiff in an action brought by the respondents Murray J. Fox *et al.*, as plaintiffs, against the respondents Glickman Corporation *et al.*, as defendants, to recover damages based upon alleged deficiencies in prospectuses and registration statements filed by the respondent Glickman Corporation with the Securities and Exchange Commission pursuant to the Securities Act of 1933. Such deficiencies have been found in a decision of the Securities and Exchange Commission dated July 31, 1964 made in proceedings to determine whether a stop order should issue with respect to the said registration statements. As part of said decision it was directed that copies thereof be distributed to all of the past and present stockholders of the corporation.

The action was instituted by the plaintiffs Fox *et al.* "as representatives of all other persons similarly situated" who may have purchased shares of Glickman Corporation and has the form of a class action under Rule 23(a) of the Federal Rules of Civil Procedure, (the type characterized as a "spurious class action") based upon the provision in said Rule authorizing a representative action where "there is a common question of law or fact affecting the several rights and a common relief is sought". The action was filed in the District Court on March 18, 1963.

The petitioner Harry H. Levy, by notice of motion dated March 15, 1965, moved to intervene as a party plaintiff in the *Fox* action under Rule 24, Federal

Rules of Civil Procedure. In the motion papers it was alleged he had purchased from the defendant Bache & Co., an underwriter, 2,000 shares of the Class A stock of Glickman Corporation, at the issue price of $12.50 per share, while there was in effect the prospectus dated October 2, 1961 which had been incorporated in the registration statement filed by the corporation; that he had relied on the statements contained in the said prospectus in making the purchase; that it contained misrepresentations of fact; that he joined in and pleaded the misrepresentations alleged in the amended complaint in the action and that he had sustained damages of approximately $21,000 when he sold the shares he had purchased. It was further stated that he did not have any knowledge of the untruth of material statements in the prospectus before acquiring such information from a communication dated August 25, 1964 sent to him as a former stockholder and which incorporated the opinion of the Securities and Exchange Commission dated July 31, 1964.

Decision on the application to intervene was reserved by the District Court Judge from March 15 to June 25, 1965. On the latter date the plaintiffs and the defendants executed an agreement purporting to settle and compromise the claims of the entire class represented and the Judge signed an order directing that notice of a hearing to determine whether the said compromise should be approved be given to all present and former stockholders. At the same time he denied the petitioner's application to intervene (App., p. A11). On appeal from the order denying the application it was affirmed by the Court of Appeals on

December 20, 1965 in an opinion printed at Appendix, p. A1. No opposition to the application to intervene had been expressed by any party before the District Court and no opposing papers were served. In the Court of Appeals the plaintiffs and defendants joined as appellees arguing for affirmance and are respondents on the petition to this Court.

## Argument for Allowance of the Writ

**I. The petitioner's right to intervene is held to turn upon whether he would be bound by the judgment in this class action. The question of whether the judgment in a class action within Rule 23(a)(3), Federal Rules of Civil Procedure (commonly termed a "spurious class action"), is binding on all members of the class represented has been determined differently by the Circuit Courts of Appeal and is a question of law which should be settled by this Court.**

The Court of Appeals has ruled in this case, and for the Second Circuit, that the judgment in a "spurious class action" is not binding on other members of the class, who will remain free to institute other actions of their own that may be based upon the same questions of law and fact. The other condition for intervention of right in Rule 24(a)(2) is that the representation of the proposed intervenor's interest by existing parties "is or may be inadequate". In a class action based upon the existence of common questions of law or fact each member may be entitled to a different quantum of damages on his individual claim and there may be a denial of recovery for a particu-

lar member by reason of a defense applicable to him. See *York* v. *Guaranty Trust Company of New York,* 143 F. (2d) 503, 528 (C.A. 2d, 1944) reversed on other grounds 326 U.S. 99; *Weeks* v. *Bareco Oil Co.,* 125 F. 2d 84, 91 (CA 7, 1941). It follows by necessity that the damages of a particular member of a class would not be proved at the trial unless he were a party plaintiff. As the Court must enter several judgments for each party plaintiff, a non-intervenor would be without representation at all in the spurious class action. Rule 23(a)(3) has been called a permissive joiner device. *Nagler* v. *Admiral Corp.,* 248 F. 2d 319, 327 (C.A. 2d, 1957); Moore's Federal Practice [2d Ed.] Vol. 3, Sec. 23.12, pp. 3473-4. Compare *Escott* v. *Barchris Construction Corp.,* 340 F. 2d 731 (C.A. 2d, 1965), cert. den. — U.S. —.

Where the applicant has failed to intervene before judgment is entered he has been denied intervention thereafter, although the judgment was in favor of the plaintiffs purporting to represent the class. *Bascom Launder Corp.* v. *Telecoin Corp.,* 204 F. 2d 331, 336 (C.A. 2, 1953) cert. den. 345 U.S. 994. Compare the concurring opinion of Friendly, C.J. in *Escott* v. *Barchris Construction Corp., supra.* A contrary holding was made by the Court of Appeals for the Tenth Circuit in *Union Carbide & Carbon Corp.* v. *Nisley,* 300 F. 2d 561, 588-9 (C.A. 10, 1962), appeal dismissed 371 U.S. 801.

In the Court of Appeals the respondents Glickman Corporation *et al.* argued that the judgment in this action would be binding on all members of the class and that the compromise agreement as approved by the Court could properly contain provisions reciting

its binding effect and barring any other stockholder from "commencing any subsequent action on account of any of the matters raised or which could have been raised by the pleadings in the lawsuit". The quoted language was incorporated in the notice of the hearing on the proposed compromise directed to be mailed to stockholders by the order of the District Judge dated June 25, 1965. Authority for such a bar provision in an order approving the compromise of a representative action under the Securities Act of 1933 appears in the decision of Judge Wyzanski in *Cherner* v. *Transitron Electronic Corp.*, 221 F. Supp. 48 (D.C., Mass., 1963).

In ruling that a judgment in the action would not bind the petitioner and other members of the class the Court of Appeals has reached a result contrary to that argued for by the respondents in this Court. The denial of intervention to the petitioner has the practical effect of barring a separate action by him based upon the Securities Act of 1933 because of the expiration of the period of limitations prescribed in that Act. In *Escott, supra,* the question before the Court was whether the expiration of the period of limitations with respect to the intervenor should cause a denial of his application; it was held that it did not.

It appears to be the view of the Court of Appeals for the Seventh Circuit that in a spurious class action other members of the class who were not parties are bound by the result. In *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (C.A. 7, 1941) there was involved a representative action based upon an alleged violation of the anti-trust laws resulting in injury to a class consisting of jobbers of gasoline. In discussing the na-

ture of such a class action and the rationale for it, the Court stated, at p. 91:

> "In other words, under the Hansberry opinion, the doctrine of *res judicata* does not bind those who assert a position adverse to that stated by those who bring the class suit. But what of its effect on those who are of the group whose interests are in accord with those who bring the suit? They are bound."

Compare *Hurd* v. *Illinois Bell Telephone Co.*, 234 F. 2d 942 (CA 7, 1956), cert. den. 352 U.S. 918.

A similar view appears in the majority opinion of the Tenth Circuit in *Union Carbide & Carbon Corp.* v. *Nisley, supra.* The Court affirmed a judgment of the trial court which authorized intervention after the verdict in favor of the plaintiffs so that other members of the class could prove their particular damages and take advantage of the determination of the defendants' liability. In discussing this procedure the Court of Appeals states its view that it would have the effect of requiring other members of the class to prove their damages or to be barred thereafter. The language of the opinion is as follows (at p. 589):

> "* * * But, even so, whether these plaintiffs would have been bound by an unfavorable judgment is not decisive. The critical fact is that the court has yet to enter the final judgments, and mutuality of estoppel is therefore inapposite. Before any final judgment is rendered, all unnamed claimants will be present and required to prove their identity with the class who were damaged by force of defendants' unlawful acts."

The Eighth Circuit has held that the provision that the proposed intervenor "is or may be bound" by the judgment is satisfied where he would be affected adversely by the precedent established in the action in which intervention is sought, even though the principle of *res judicata* would not apply. *Kozak* v. *Wells,* 278 F. 2d 104, 110-112 (C.A. 8, 1960). See also *Stadin* v. *Union Electric Company,* 309 F. 2d 912, 918 (C.A. 8, 1962). A similar rule was applied by the Court of Appeals for the District of Columbia in *Atlantic Refining Company* v. *Standard Oil Company,* 304 F. 2d 387 (C.A., D.C., 1962). Compare *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683.

It appears important to have the law on intervention of right in a spurious class action definitively resolved. The same issue of intervention of right with respect to a true class action is to be reviewed by this court pursuant to its grant of certiorari in *Holt* v. *Allegheny Corp.,* Docket No. 131, 1965-66, to be argued March 21, 1966, reported below at 344 F. 2d 571 (C.A. 2, 1965).

**II. In a spurious class action intervention by other members of the class represented should be a matter of right.**

The purpose of Rule 23 (a)(3) is to permit the determination of a common question of law or fact in a single suit and has as its objective judicial expediency and the avoidance of a multiplicity of actions. The right of each member of the class is several and several judgments follow, although the

action is representative in form. In the present case the purchasers of Glickman Corporation stock (the class represented) purchased at different offering prices under two separate prospectuses. Some sold their stock later at a loss and others retain ownership. As to certain stockholders there may also be available the defense that the market price was affected by factors other than the deficiency in the registration statement.

The representation of other members of the class is of necessity "inadequate", as that term is used in Rule 24 (a). None of the present parties plaintiff propose to prove the petitioner's damages at the trial or that of any other member of the class than themselves. The argument that the petitioner could prove his damages after the trial cannot be supported. It assumes a judgment for the plaintiffs on the issue of liability and a provision authorizing other members of the class to thereafter intervene. As noted above, the Courts of Appeal are not in agreement as to legal authorization for such post-trial intervention. If there should be a judgment for the defendants at the trial, intervention would, of course, no longer be possible. Other members of the class that may have relied on being protected because of the representative character of the pending action would find that a new action was barred by limitations and would have been subjected to the "trap" referred to by the Court of Appeals in *York* v. *Guaranty Trust Company of New York, supra,* at p. 529, and which actually operated to ensnare the unsuccessful proposed intervenors after trial in *Bascom Launder Corp., supra.* The existence of a "trap" for other members of the class is also adverted to in *Escott, supra.*

The law as now enunciated by the precedents leaves the petitioner (and other stockholders in the class) in an uncertain legal position with respect to his damages. The petitioner may not be able to intervene after the trial if the Second Circuit follows its decision in *Bascom, supra,* the period of limitations will have run against him, he will not have the benefit of the tolling of limitations which ensues from a representative action on behalf of a class (as does an intervenor) and, by every practical measure, he will have been "bound" by the judgment in the action.

Rule 24(a) applies to the case where "the applicant is or may be bound by a judgment in the action". In a spurious class action it would seem indisputable that other members of the class represented "may be" bound, in view of the decided cases. The law should be settled that in such a class action, intervention is available as of right.

It is not an answer to point out that a compromise may be effected which provides that other members of the class may share in the settlement amount. The compromise order is to contain express terms binding the class, whether or not they elect to share in the settlement. The application of Rule 24(a) cannot turn upon whether or not, in a particular case, a compromise is reached or anticipated.

**III. It was erroneous for the courts below in deciding the application as one for permissive intervention to consider that petitioner could be heard in objection to the proposed compromise under Rule 23(c), Federal Rules of Civil Procedure.**

The District Court delayed a decision on the application to intervene for more than three months and denied it at the same time that a compromise agreement was submitted by the parties and the Court signed an order directing a hearing on the proposed compromise on notice to all stockholders. It is noteworthy that such notice to the members of the class represented is not required in the case of the "spurious" class action, but remains within the discretion of the Court, whereas it is required by Rule 23(c) for the dismissal or compromise of a true class action, i.e., those within Rule 23(a)(1).

The proposed compromise should not have been considered by the courts below in passing on the application as one for permissive intervention under Rule 24(b). This was a collateral matter and should not enter into the exercise of the Court's discretion. The Rule provides that the Court may consider whether intervention would "unduly delay or prejudice the adjudication of the rights of the original parties". A compromise is the opposite of an "adjudication of rights" and eliminates the necessity for an adjudication. No other standard to be applied to permissive intervention is set forth in the text of the Rule.

Whether or not a compromise will be approved and become effective would be dependent upon the proof offered at the hearing. The right of any member of the class to be heard in objection to the compromise is of a different character from the right of a party plaintiff. It is the plaintiffs who determine whether or not to propose and agree to a compromise of the action. It is the plaintiffs who, if the compromise is not effectuated, have a right to proceed to the trial on the merits. The hearing on a compromise presents a limited issue: whether giving consideration to the evidence available and the difficulty of proving the allegations of the complaint and overcoming the defenses, the amount proposed to be paid by the defendants is fair and reasonable.

In objecting to a compromise the individual stockholder must assume a disproportionate burden. He cannot have the benefit of acting for a class. A successful opposition produces no immediate or known benefit for him and absent a right to intervene as a party he can have no further influence on the course of the action.

In contrast to the significant rights of an intervenor to prove his claim and damages, the asserted right to object to a proposed compromise seems insubstantial.

## Conclusion

WHEREFORE, the petitioner respectfully prays that a writ of certiorari be issued out of this Honorable Court directed to the United States Court of Appeals for the Second Circuit commanding that court to

certify to this court a transcript of the record and proceedings of the case entitled on its docket, "Murray J. Fox *et al.* vs. Glickman Corporation *et al.*", Docket No. 29954.

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Dated: New York, N.Y.
March 17, 1966.

## Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 152—September Term, 1965.

(Argued November 9, 1965
Decided December 20, 1965.)

Docket No. 29954

MURRAY J. FOX, DOROTHEA FOX, SOL FOX and SYLVIA FROST, on behalf of themselves, and as representatives of all other persons similarly situated,

*Plaintiffs-Appellees,*

—v.—

GLICKMAN CORPORATION, LOUIS GLICKMAN, LOUIS A. SIEGEL, AARON KATZ, WILLIAM M. JENNINGS, WILLIAM G. DILLON, BACHE & Co., HIRSCH & Co., INCORPORATED, HIRSCH & Co. and MORRIS COHON & COMPANY,

*Defendants-Appellees,*

HARRY H. LEVY, Applicant for Intervention,

*Appellant.*

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

*Opinion of the Court of Appeals for the Second Circuit*

Appeal from an order of the District Court for the Southern District of New York, Charles M. Metzner, *Judge,* denying an application for intervention in a spurious class action. Affirmed.

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JOSEPH CALDERON (Bergerman & Hourwich, New York, N. Y.; William Baronoff, of Counsel), *for Appellant.*

ROY L. REARDON (Simpson Thacher & Bartlett, New York, N. Y., Walter J. Josiah, Jr., of Counsel), *for Defendants-Appellees.*

HERMAN ODELL, New York, N. Y., *for Plaintiffs-Appellees.*

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FRIENDLY, *Circuit Judge*:

This appeal takes us back to territory—intervention in a spurious class action—which we visited last term in *Escott* v. *Barchris Constr. Corp.,* 340 F. 2d 731 (2 Cir. 1965). Like that case it illustrates the desirability of amending Rules 23 and 24 of Federal Civil Procedure. See Preliminary Draft of Proposed Amendments to Rules of Civil Procedure, March 1964, 94-120.

In March 1963, Murray J. Fox and two other holders of Class A stock of Glickman Corporation brought an action in the District Court for the Southern District of New York against the corporation and some of its directors to recover damages arising out of their investment in Glickman stock. The complaint alleged violations of the Securities Act of 1933, 15 U.S.C.

§77a, and the Securities Exchange Act of 1934, 15 U. S. C. §78a, through inaccuracies in registration statements filed with the SEC in connection with public offerings in October 1960 and October 1961; the plaintiffs sued on behalf of themselves and all other persons similarly situated. The complaint was later amended to include the underwriters as defendants. Similar actions were subsequently commenced in the same court by Arthur Rudnick and Morris Lazar in June and October 1963. In January 1964 the three actions were assigned for all purposes to Judge Metzner who proceeded to conduct a pretrial conference. In the fall of 1964, he directed that the production of documentary evidence and the taking of depositions should be concluded by the end of the year, that pretrial memoranda should be exchanged in early March 1965, that a conference to prepare a pretrial order should be held in late March, and that trial should begin on May 4.

On March 16, 1965, Levy moved to intervene in the *Fox* action pursuant to F. R. Civ. P. 24. He alleged that in October 1961 he purchased from Bache & Co., a defendant underwriter, 2,000 shares of Glickman Class A common stock at $12.50 per share; that, as alleged in the *Fox* complaint, the prospectus which was incorporated in the registration statement contained misrepresentations of fact and failed to contain other facts necessary in order that statements therein should not be misleading; that he had no knowledge of these untruths until August 1964 when Glickman Corporation sent him an opinion of the SEC dated July 31, 1964; and that the loss from the sale of his shares was approximately $21,000. On

March 22, at a pretrial conference to which Levy's counsel were invited, the judge announced that the motion for intervention would be taken under advisement.

During the spring the attorneys for plaintiffs and defendants in the three actions pursued settlement discussions, and the trial was adjourned. At a conference before the judge on June 25, which Levy's counsel again attended by invitation, the attorneys for the parties signed an agreement, subject to approval of the court under F. R. Civ. P. 23(c), purporting to settle the claims of all purchasers of stock for $1,825,000, which, after deduction for such attorneys' fees and expenses as the court might allow,[1] would be distributed in accordance with an agreed schedule determining the "recognized losses" of various groups of stockholders. The judge thereupon directed that notice of a hearing be given to present and former stockholders and that interested persons show cause why the settlement should not be approved by the court. At the same time he entered an order denying Levy's motion to intervene. His memorandum characterized the motion as an application under F. R. Civ. P. 24(b) for permissive intervention in a spurious class action, and noted that it was made when all pretrial procedures had been completed and the attorneys were preparing an order looking toward a speedy trial of actions that had been pending for two years.

Levy appeals on the alternative grounds that he was entitled to intervene of right, and that, if not, the

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[1] An approved notice to stockholders said that the plaintiffs agreed among themselves that the maximum amount to be allowed for attorneys' fees and expenses was $425,000.

denial of permissive intervention was an abuse of discretion.[2] Federal Rule 24(a) accords intervention of right "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." The latter requirement would seem to bar Levy's claim to such intervention since the *Fox* suit clearly is a spurious class action under F. R. Civ. P. 23(a)(3) and the established view in this circuit is that a judgment in such a suit does not bind members of the class who have not become parties. *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387, 390 (2 Cir. 1944); *Nagler* v. *Admiral Corp.*, 248 F. 2d 319, 327 (2 Cir. 1957); accord, *Albrecht* v. *Bauman*, 130 F. 2d 452 (D. C. Cir. 1942); *Schatte* v. *International Alliance of Theatrical Stage Employees*, 183 F. 2d 685, 687 (9 Cir. 1950); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F. 2d 737, 742 (7 Cir.), cert. denied, 344 U. S. 820 (1952); 3 Moore, Federal Practice §23.11(3), at 3465 (2d ed. 1964). The fact that, if the defendants were successful, a subsequent action by Levy would be barred by the three year statute of limitations, Securities Act of 1933, 15 U. S. C. §77m, would not mean that he was or might be "bound" by the prior judgment within the intendment of the Rule. Cf. *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683, 694 (1961).

Levy responds that other federal courts have taken

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[2] No challenge to our appellate jurisdiction has been made, and, for reasons stated in *Levin* v. *Ruby Trading Corp.*, 333 F. 2d 592, 594 (2 Cir. 1964), we shall look to the merits of the appeal on the assumption that this exists. See also Wright, Federal Courts 287 (1963).

a view as to the effect of a judgment in a spurious class action differing from this court's. See *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (7 Cir. 1941); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10 Cir. 1961), appeal dismissed on stipulation, 371 U. S. 801 (1962); *Cherner* v. *Transitron Electronic Corp.*, 221 F. Supp. 48 (D. Mass. 1963). Therefore, he argues, since the Supreme Court has not yet spoken to the point, the law on this issue remains uncertain and hence the *Fox* action is one in which he "may be" bound by a judgment. We find the argument untenable. We do not read the cases cited as having truly decided what Levy says they did. In the *Weeks* opinion, the court quoted with approval Professor Moore's conclusion that in a spurious class action the judgment binds only participating parties; its subsequent assertion that a jdgment would bind members of a class with similar interests, made in deciding on the propriety of a spurious class action in that case, was presumably intended to refer only to those members who initiated or intervened in the suit, see 125 F. 2d at 89, 91, as the later decision of this same court in *Kainz* v. *Anheuser-Busch, Inc., supra,* 194 F. 2d at 742, indicates. The *Union Carbide* decision is no more helpful to Levy, the sole relevant issue there having been, in the court's words, "whether in a class action under Rule 23(a)(3) . . . non-participating plaintiffs may intervene after determination of defendants' liability, to share in the fruits of a judgement obtained by their participating representatives." 300 F. 2d at 587. As for the *Transitron* case, the question before Judge Wyzanski was whether he should permit inclusion, in an order approving settle-

ment of a spurious class action of a provision, favored by the parties, which purported to make the settlement binding on all members of the class. His decision was that if the parties "have faith in such a bar order, their faith is not so clearly misplaced that this Court should decline to approve a settlement which incorporates the bar order"; he recognized "very respectable authority" contradicting their expectations and declared that anyone who could show that the court "was without jurisdiction to bar his claim," could stay out of the settlement and "on his own, sue defendants to establish their liability and his damage," 221 F. Supp. at 53. Moreover, if the cited decisions held more than we think they do, the mere possibility of ultimate reversal of a court's own settled rule of *res judicata,* suggested by contrary decisions of other federal courts, is not, in our view, what the rule makers had in mind when they accorded intervention of right to one who "may be" bound. Compare *International Mortgage & Inv. Corp.* v. *Von Clemm,* 301 F. 2d 857, 861-62 (2 Cir. 1962). We thus are not required to determine whether Levy's case for intervention of right does not fail in any event because of the additional requirement of F. R. Civ. P. 24(a)(2) that he show actual or possible inadequacy in the representation of his interest by existing parties.[3]

[3] Levy's principal argument on this score is that since, in contrast to a derivative action, he must prove his own damages in order to recover, representation by the existing plaintiffs would necessarily be inadequate. But this would scarcely entitle him to intervene of right except for the limited purpose of ultimately proving his damages if liability should be established.

While Levy's claim does not qualify for intervention of right, it does fit snugly under F. R. Civ. P. 24(b) allowing permissive intervention "(2) when an applicant's claim or defense and the main action have a question of law or fact in common." See *Escott* v. *Barchris Constr. Corp.*, 340 F. 2d 731, 733 (2 Cir. 1965). Addressing himself to the further provision of Rule 24(b) that "in exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," Levy argues that his intervention would not have had a delaying effect if the judge had allowed it in March when it was sought. Moreover, the judge could have conditioned a grant of intervention on Levy's abiding by pretrial orders already made. This, however, is not the whole story. Allowing intervention in a case like this with respect to the merits, as distinguished from the limited purpose of proving damages, may well result in "accumulating proofs and arguments without assisting the court." *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 141-42 (1944); see also *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943).

The chronology of events suggests that the judge may well have been concerned lest granting the request for intervention would have the effect of prohibiting a settlement affecting Levy without his consent, as distinguished from the more limited right to be heard in objection under F. R. Civ. P. 23(c)—a matter of some moment on the facts here since intervention would relieve Levy of the limitations problem that

would bar an independent suit by him. If allowing Levy to intervene would give him such a position, a point on which authority seems lacking, it was not an abuse of discretion to deny a request which came so late and relegate Levy to his rights under F. R. Civ. P. 23(c). Of course, if the settlement should not be consummated and defendants' liability should be established, the denial of Levy's instant motion ought not to prejudice a further application by him to intervene for the purpose of proving his damages.

Affirmed.

## Judgment of Court of Appeals for the Second Circuit

### UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of December one thousand nine hundred and sixty-five.

Present:

HON. J. EDWARD LOMBARD, *Chief Judge,*
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
*Circuit Judges.*

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MURRAY J. FOX, DOROTHEA FOX, SOL FOX and SYLVIA FROST, on behalf of themselves and as representatives of all other persons similarly situated,
Plaintiffs-Appellees,

HARRY H. LEVY,
Proposed Intervenor-Appellant,

GLICKMAN CORPORATION, LOUIS GLICKMAN, LOUIS A. SIEGEL, AARON KATZ, WILLIAM M. JENNINGS, WILLIAM G. DILLON, BACHE & CO., HIRSCH & CO., INCORPORATED, HIRSCH & CO., and MORRIS COHON & COMPANY,
Defendants-Appellees.

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*Judgment of Court of Appeals for the Second Circuit*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decree that the order of said District Court be and it hereby is affirmed with costs to the appellees.

A. DANIEL FUSARO
Clerk

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**District Court's Order Denying Petitioner's Motion to Intervene**

This application for intervention is considered made pursuant to FRCP 24(b). This being a spurious class action Rule 24(a)(2) is inapplicable. Motion denied since at the time it was made all pre-trial procedures had been completed and the attorneys in the various actions were preparing a final pre-trial order looking toward a trial on May 17, 1965 of those actions which had been pending since March, 1963.

So Ordered.

June 25, 1965.

CHARLES N. METZNER
USDJ